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No._____

In The Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner*

v.

HYDROLEVEL CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a non-profit, voluntary membership organization may be found liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence.

2. Whether a non-profit, voluntary membership organization is strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts were neither authorized nor ratified by the organization, (b) the members did not intend to, and did not in fact, benefit the organization by their actions, and (c) the members actively deceived the organization for their own purposes and benefit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner American Society of Mechanical Engineers ("ASME") respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980). It also appears in the Appendix hereto at A-1 to A-26.* The District Court filed no opinions on issues raised in this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. On December 8, 1980, Respondent Hydrolevel Corporation ("Hydrolevel") filed a motion to extend the time in which to file a petition for rehearing to December 15, 1980; this motion was granted and made applicable to both parties. A timely petition for rehearing, and suggestion of rehearing *en banc*, was filed by ASME on December 15, 1980. The petition and suggestion were denied on January 22, 1981. A-27. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This suit involved application of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. These provisions appear at A-28.

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* Citations to the Appendix to this petition are in the above form. The Joint Appendix in the Court of Appeals is cited as "J.A.". ASME's Exhibit Volume in the Court of Appeals is cited as "AX V.". Plaintiff's and defendant's exhibits in the District Court are cited as "PX" and "DX," respectively.

STATEMENT OF THE CASE

A. Synopsis

ASME is a non-profit technical and scientific society founded in 1880 for the purpose of enhancing the use of mechanical engineering in the public interest.* It has more than 100,000 individual members, drawn from a broad spectrum of American life, including industry, academia, government, insurers and consumer groups. It conducts educational and research programs, publishes a national magazine and a number of research journals devoted to mechanical engineering and, of particular importance to this case, promulgates and renders interpretations with respect to over 400 codes and standards designed to improve public safety and promote standardization. These codes and standards are "voluntary" in that they do not have the force of law. However, they have been incorporated by reference into many federal, state and local laws, regulations and ordinances.

This case focused on the improper issuance and subsequent misuse of a single letter written by a volunteer member of ASME interpreting an ASME standard of performance for low-water fuel cut-offs, a safety device included in steam and hot water boilers. The facts at trial showed, and the Court of Appeals assumed for purposes of its decision, that in writing the letter the drafter acted disloyally to ASME, intending through the letter to benefit a third party without the knowledge or intentional participation of ASME. Hydrolevel, a manufacturer of one such cut-off device, contended that the letter was the result of an antitrust conspiracy with one of Hydrolevel's competitors, pursuant to which Hydrolevel was damaged and eventually forced out of business. The Court of Appeals held, in essence, that ASME was liable under the federal antitrust laws for damages caused by the alleged conspiracy even though its participation therein was "unintentional." It further held that ASME was strictly

* Contrary to the view apparently embraced by the Court of Appeals, ASME is not a trade association and it has no corporate members. It is a scientific membership corporation exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

liable for the acts of its members within the scope of their "apparent authority," even though they did not, and logically could not, intend to benefit ASME, but rather actively deceived it to further their own ends. The panel thus allowed the finding of liability to stand, although remanding for a new trial on damages.

B. The Facts

1. Background

As noted above, ASME promulgates and renders interpretations with respect to more than 400 codes and standards. Over 10,000 ASME volunteer members participate in the many ASME committees and subcommittees that draft, revise and interpret these codes and standards. A-3; 635 F.2d at 121. One of the oldest ASME codes is the Boiler and Pressure Vessel Code (the "B-PV Code"), which sets standards of construction and performance for various components of steam and hot water boilers and other pressure vessels. The B-PV Code was first promulgated in the early part of the twentieth century when boiler explosions caused by poor design or fabrication or by inadequate safety precautions frequently caused death, injury and property damage. (J.A. 928-29). Section IV of the B-PV Code, which deals specifically with heating boilers, has been adopted in 46 states and all Canadian provinces. (PX 30A at Exh. H, pp. 2-3). Since the promulgation and acceptance of the B-PV Code, boiler explosions have been virtually eliminated. (J.A. 929).

As a public service, ASME provides free of charge to members and non-members alike written and oral interpretations of its codes. Under the procedures set forth in its by-laws, requests for interpretation are referred to the ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly worded inquiries in writing. ASME regularly receives approximately 20-30,000 such inquiries per year regarding the B-PV Code alone. (J.A. 861). The Boiler and Pressure Vessel Committee ("the B-PV Committee") supervises and interprets the B-PV Code and, in turn,

maintains the Section IV Subcommittee responsible for that section.

In answering questions concerning an interpretation of a code, neither ASME nor its committees approve, recommend or endorse proprietary or specific designs. Rather, ASME simply states abstract standards of construction or performance—that is, principles of acceptable levels of safe operation. Letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered by ASME. (AX V. 191; J.A. 732-33).

2. Hydrolevel and the Low-Water Fuel Cut-Off

Boilers generally include a device that automatically cuts off the fuel supply—and thus shuts down the boiler—before the water in the boiler falls to a dangerously low level. If a cut-off device fails to operate, it may result in "dry firing"—that is, operation of the boiler without a sufficient supply of water to moderate temperature. Dry firing can easily result in an explosion causing injury to persons or property. (J.A. 169, 928).

Traditionally, fuel cut-offs have operated on a "float" principle. If the water in a boiler drops below a critical level, the float falls, tripping a switch which cuts off the fuel supply. For many years, McDonnell and Miller, Inc. ("M&M") manufactured a float-type cut-off device, and accounted for 70-85% of all American sales. In 1965, Hydrolevel began manufacturing an electrically activated cut-off of the so-called "probe" variety. With a probe cut-off, when water in the vessel is maintained at a certain level, water covers an electrode, thus completing a circuit activating the fuel supply. If the water level falls below the electrode, the circuit is broken and the fuel supply is terminated. One difficulty with the probe cut-off is that, when used in a steam boiler, bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. For this reason, certain Hydrolevel models for residential steam boilers incorporated a "time-delay" element to prevent temporary fluctuations in water level from cutting off the fuel supply. (J.A. 161-62; DX BN, pp. HT1268-9).

3. The April 29, 1971 Letter

In March 1971, James Solon, President of M&M; Eugene Mitchell and John James, Vice-Presidents of M&M; and T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), met over dinner in Chicago. At that time, James and Hardin were also active as ASME volunteers, Hardin as Chairman and James as Vice-Chairman of the Section IV Subcommittee. Among other matters, those present at the Chicago dinner discussed the possibility of requesting from ASME advice on whether a low-water fuel cut-off could meet ASME standards if it included a time-delay. (PX 16a, pp. 787-92; PX 18A, pp. 382-88; PX 14, p. 133). James and Hardin thereafter consulted about the wording of the request. (PX 16a, pp. 877, *et seq.*).

On April 12, 1971, Mitchell of M&M directed a letter, drafted by James, to W. B. Hoyt, staff Secretary of the B-PV Committee. This letter requested an interpretation of ¶ HG-605 of the B-PV Code. The B-PV Code requires that a glass gauge be placed on heating boilers so that one can visually determine the amount of water in the boiler. (AX V. 8-9 (¶ HG-602(b))). Paragraph HG-605(a), in turn, requires that a cut-off be located so as to cut off the fuel supply automatically when the surface of the water falls to the lowest visible part of the gauge glass. (AX V. 2 (¶ HG-605(a))).

The April 12, 1971 letter (AX V. 1) inquired whether ¶ HG-605 permitted the incorporation of a time-delay feature in a cut-off if it would operate only "after the boiler water level reaches some point below the visible range of the gauge glass?" Following standard Committee procedures, Hoyt, who had no expertise in this aspect of heating boilers, referred the letter to Hardin, as Chairman of the appropriate Subcommittee. (J.A. 864-65, 903-04). Still following ASME procedures, Hardin composed a draft reply, which he sent to Hoyt, as well as to the Chairman and Vice-Chairman of the B-PV Committee. (AX V. 6-7).

On April 29, 1971, Hoyt responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman,

adopting Hardin's language as an "unofficial communication." A-7; 635 F.2d at 122. In essence, the reply (AX V. 10) stated that "it is the intent of Par. HG 605(a) that the low-water fuel cut-off operate immediately and positively when the water boiler level falls to the lowest visible part of the water gauge glass," and that a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay."

4. Misuse of the April 29, 1971 Letter by M&M

Notwithstanding the extremely limited nature of the April 29 letter, officials of M&M proceeded to misuse it in promotional efforts, linking the "advice" of the "unofficial communication" to Hydrolevel's specific device. M&M included in a booklet for its salesmen called "The Opposition—Who They Are, How to Beat Them" an erroneous statement that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code . . . ." (AX V. 11-20). In addition, M&M officials made similar statements to potential customers to persuade them not to buy the Hydrolevel device. (See, *e.g.*, PX 13, pp. 139-43). There was, however, absolutely no evidence that ASME participated in this activity or was even aware of the misuse of its letter until Hydrolevel brought the matter to its attention in early 1972.

In January 1972, a vice-president of Hydrolevel learned that potential customers had been told about ASME's April 29 letter, as misrepresented by M&M. (J.A. 186-87). He wrote to Hoyt of ASME, asking for a copy of the letter. (AX V. 21). On February 8, 1972, ASME responded, quoting in full the substantive provisions of the April 29 letter. (AX V. 22). Thereafter, on March 23, 1972 the president of Hydrolevel directed a lengthy complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members (AX V. 29-37), requesting that ASME issue a "correcting statement."

5. ASME's June 9, 1972 Letter

Upon receipt of Hydrolevel's complaint, ASME placed the matter on the agenda for the next meeting of the Section

IV Subcommittee and the B-PV Committee. Hydrolevel was informed of these meetings but, despite the fact that all ASME meetings are open to the public and that even non-members have an opportunity to participate in debate, it did not send a representative.

After public discussion in both the Subcommittee and the B-PV Committee, the B-PV Committee drafted a letter specifically informing Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays . . . ." Thereafter, the draft was circulated with the minutes of the Committee meeting to over 300 individuals active in the boiler market (J.A. 673, 837), and was issued in final form on June 9, 1972 (AX V. 77). Hydrolevel distributed the June 9 letter to customers and potential customers. (J.A. 294; AX V. 78-79).

Although Hydrolevel could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either its contents or the procedures leading to its issuance (App. 818-19), it did not do so. On August 19, 1975, Hydrolevel filed this suit.*

C. The Complaint, The Trial, and The Court of Appeals' Opinion

1. *The Complaint.* Although the amended complaint against ASME originally contained several counts based on state law charges, those counts were voluntarily withdrawn. The remaining count charged that ASME conspired with M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. (J.A. 62-65). Hydrolevel's apparent theory was that through issuance and misuse of the April 29, 1971 letter, ASME conspired with M&M and

* Named along with ASME as defendants were the International Telephone and Telegraph Corporation and Hartford; ITT had purchased M&M in December 1971, and, according to Hydrolevel, Hartford had participated in the conspiracy through the acts of Hardin. Prior to trial, ITT and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

Hartford to eliminate Hydrolevel as a potential force in the cut-off market.

2. *The Trial.* During the presentation of its case, Hydrolevel proceeded on the theory that James and Hardin devised a "loaded" question to be posed to ASME, and orchestrated an intentionally misleading response by ASME in the form of the April 29, 1971 letter. Hydrolevel's premise was that ASME participated in and was liable for these acts. At the close of the plaintiff's case, the trial judge expressly rejected this theory, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter.* Instead, the Court allowed the case to continue solely on a new and hitherto unexpressed theory that ASME might be liable for M&M's activities because it failed to take more effective steps when it first learned of them in 1972.**

3. *The Court of Appeals' Opinion.* On appeal to the United States Court of Appeals for the Second Circuit, the parties focused on two theories. First, ASME argued that there was no evidence that it intentionally or deliberately participated in a conspiracy to restrain trade or to monopolize; Hydrolevel, on the other hand, contended that ASME's handling of the April 29, 1971 letter showed that it was an active and knowing

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* "If all you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible when some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case. So even though M&M wanted to use your client [ASME] as a vehicle for getting some advantage, I don't think that is enough to hold you liable." (J.A. 593-94).

** ". . . But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does not seem to me that it can be argued that the failure at that point to take reasonable steps . . . to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into." (J.A. 594).

participant. Second, Hydrolevel argued—and ASME disputed—that ASME's reaction to the discovery of the circumstances surrounding the April 29, 1971 letter constituted a "ratification" of the conspiratorial acts. The first theory had been rejected by the trial judge at the close of the plaintiff's case, while the second theory reflected the basis on which the judge allowed the case to go to the jury. Under either theory, ASME argued that under normal principles of agency law, it could not be held liable for the acts of disloyal volunteer members unless those members intended through their acts to benefit ASME.

In its opinion, the panel of the Court of Appeals did not reach either theory of liability; although, in its damages section, it implicitly rejected Hydrolevel's "ratification" argument by holding that ASME had cured any adverse effect of the April 29, 1971 letter by publishing a full and fair correction of it on June 9, 1972. A-22 to A-23; 635 F.2d at 129. Rather, the Court noted: "We need not resolve that dispute [between the two theories], for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory." A-13; 635 F.2d at 125.

The panel acknowledged that "the appropriate theory for conventional torts" (A-13; 635 F.2d at 125) is that a corporation is liable for the acts of its agent only if the agent intended to advance his employer's interest. It then decided that vicarious liability in federal antitrust cases should not be governed by this general rule, but rather that antitrust defendants should be liable for acts of their agents even when the agents acted solely for their own purposes and actively deceived the principal. It concluded, "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement." A-13; 635 F.2d at 125. The Court reasoned that a conspiracy to restrain trade is so

similar to fraud, injurious falsehood, and defamation that application of the *Restatement* rules governing those torts is appropriate.

The Court of Appeals thus held that in federal antitrust cases the standard for vicarious liability should be the broadest that appears in agency law, and that a principal is liable for all acts of its agents within the scope of their "apparent authority." The Court reached this conclusion even though it acknowledged that the organization had no knowledge of the agents' real motives, the agents did not intend to benefit the organization, and the agents actively deceived the organization in order to benefit themselves and their true principals (in this case, their employers, M&M and Hartford). Finally, the panel emphasized that ASME's participation in the antitrust conspiracy was "unintentional" (A-26; 635 F.2d at 131), and suggested that its decision was based on a theory of negligence. The panel noted that "[w]hile ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product." A-16; 635 F.2d at 126.

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals is necessary to resolve an issue of national significance concerning the liability of non-profit, voluntary associations for improper and unauthorized acts of their volunteer members.

The core of the Court of Appeals' decision was its determination that the general rule of agency liability was inapplicable in antitrust cases and that in this area vicarious liability should be governed by the exceptional rule of "apparent authority."

As this petition will demonstrate, the panel's decision squarely conflicts with controlling decisions of this Court and

with decisions in other Courts of Appeal. In addition, the decision establishes a revolutionary new standard for vicarious liability under the federal antitrust laws that is wrong as a matter of sound antitrust policy and will adversely affect a broad range of quasi-public, non-profit organizations performing vital functions in the public interest. For these reasons, the Court should grant the petition for a writ of certiorari.

I. The Application of an "Apparent Authority" Standard for Agency Liability, and Liability for Negligent, "Unintentional Participation" in an Antitrust Conspiracy, are Contrary to the Decisions of this Court.

This Court has held on numerous occasions that an antitrust conspiracy, whether under Section 1 or Section 2 of the Sherman Act, requires an intentional, purposeful agreement.

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

American Tobacco Co. v. *United States,* 328 U.S. 781, 810 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951) (requirement that conspirators have "a unity of purpose or a common design and understanding"); see also *United States* v. *General Motors,* 384 U.S. 127, 143 (1966) ("joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan"). These decisions reflect the inherent nature of a conspiracy: one cannot be held liable for the acts of others unless one intends to act jointly with them and has knowledge of at least some of the illicit purposes of the joint venture. See generally, *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 443 n.20 (1978).

In this case, the panel never addressed the question of whether ASME had knowledge of the acts of James, Hardin and M&M or intended to participate in them. It reasoned that, since Hardin and James conspired to aid M&M in its

efforts to disparage Hydrolevel's product and since they acted within the scope of their "apparent authority" from ASME, ASME was liable as a participant in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act.* The panel expressly rejected any requirement that plaintiff had to demonstrate that Hardin and James intended even in part to benefit ASME or that ASME ratified their acts before they could be attributed to ASME. Indeed, the panel assumed for purposes of its holding that Hardin and James did not intend to benefit ASME, that they concealed their true motives from ASME and that ASME did not ratify their acts when it finally learned of them.

This Court has expressly ruled that "apparent authority" of an agent is an insufficient predicate for a principal's liability under the federal antitrust laws. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), a labor union was sued under the Sherman Act for concerted activity having an anticompetitive effect on plaintiff's business. Addressing the question "whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business," *id.* at 393, this Court reversed a verdict in the plaintiff's favor, holding that under agency principles applicable to the antitrust laws, a voluntary organization could not be held liable for the acts of its members absent either actual authority or ratification:

> "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are ultra vires of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of

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* The Court of Appeals completely avoided discussion of the requirements of a monopolization charge under Section 2 by overlooking it: although the complaint, summations, charge and judgment all emphasized that Hydrolevel proceeded on a theory that ASME was liable under both Section 1 and Section 2, the opinion refers only to a "conspiracy to restrain trade in violation of Section 1." A-2; 635 F.2d at 120.

> holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen."

Id. at 395. In *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295 (1925), the case again came before this Court after retrial, during which the plaintiff had introduced evidence showing that the president of the union had directly encouraged the acts complained of. This Court held that, while such evidence might have sufficed to impose personal responsibility on the labor officials involved, it was insufficient to impose liability on the union. The Court held that "it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 304.

In the instant case, the panel dealt with the *Coronado Coal* decisions first by misstating their applicability to ASME's argument, and then by proposing an artificial ground for "distinguishing" them. Instead of discussing *Coronado Coal* in terms of agency liability, the panel phrased ASME's argument as being that "ASME's unique structure or status should mandate a different result." A-18; 635 F.2d at 127. In fact, while *Coronado Coal* implied that a voluntary association should be protected by at least as strict a test as that governing business organizations, it squarely held that in *any* case actual authority or ratification, rather than apparent authority, was necessary.

The panel then reasoned that *Coronado Coal* merely "held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. 268 U.S. at 304." A-18; 635 F.2d at 127. This limitation of *Coronado Coal* to instances where an organization "accepts" authority for its members' action makes no sense and is rejected by precedent.

While an entity's internal organization undoubtedly has bearing on its liability for the acts of its members, allowing an organization to "accept" or decline liability as a matter of choice is hardly sound policy and exalts form over substance, and the only other court to address this claimed distinction has so held. In *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227 (8th Cir. 1942), the Court reversed a verdict in an antitrust prosecution on the ground that a voluntary organization was not liable for the acts of its members absent actual authority:

> "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

Id. at 235. In particular, the Eighth Circuit rejected an argument based on the distinction adopted by the panel in this case, namely, that *Coronado Coal* protected only an international with limited constitutional powers rather than a local, noting that "the difference fundamentally is primarily one of degree." *Id.* at 236.

In short, *Coronado Coal* squarely stands for the proposition that antitrust liability of a voluntary organization can be based on the acts of its members only if the members have actual authority to commit the illicit acts or if the organization ratifies those acts.* In veering so sharply from this precedent, the Court of Appeals committed error that should be reviewed by this Court.

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* Rather than following *Coronado Coal*, the panel purported to follow *Gleason* v. *Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929), as holding that an organization is liable for unauthorized, disloyal acts of employees. A-13 to A-14; 635 F.2d at 125. *Gleason* involved a state law suit for liability on a bill of lading. It did not discuss or involve antitrust law and has never been followed in any antitrust case. As one commentator noted, its holding is "perhaps best explained" on the ground that the principal's involvement "in commerce makes it fair to impose liability on the carrier." Seavey, *Agency* § 92, p. 164 at n. 57 (1964).

The panel's opinion is also inconsistent with this Court's decisions requiring intentional participation in an antitrust conspiracy. *Coronado Coal* not only provides the standard for holding a principal liable for the acts of its agents, but it also establishes a rational basis for imputing to the principal the conspiratorial knowledge and intent that this Court has repeatedly recognized as an essential element of an antitrust conspiracy. See p. 11, *supra*. The panel's "apparent authority" theory provides no such basis; indeed, the panel candidly conceded as much, finding ASME liable for "unintentional participation" in the conspiracy. A-26; 635 F.2d at 131. Thus, the panel did not find that ASME knew of the illicit acts or intended to participate in them; rather, it based ASME's liability on a theory of negligence, holding that since ASME failed to supervise the acts of its volunteer members, it was strictly liable for their anticompetitive acts. See p. 10, *supra*.

This Court has never allowed a finding of antitrust liability to be based upon a negligence theory. Indeed, liability on the basis of negligence is squarely inconsistent with a requirement of intentional, knowing participation in a conspiracy. Thus, the panel's decision not only squarely conflicts with this Court's decision in *Coronado Coal*, but undermines the requirement of intentional participation in an antitrust conspiracy.

II. The Panel's Decision Allowing Vicarious Antitrust Liability on the Basis of "Apparent Authority" Conflicts With Every Decision on this Question In Other Circuits.

In holding that "apparent authority" was a sufficient basis for vicarious liability under the antitrust laws, and that an intent to benefit the principal was unnecessary, the panel did not discuss or rely on a single antitrust decision. In fact, every federal court that has ruled on the matter has held that, absent ratification by the principal, an antitrust plaintiff bears the burden of showing that an agent intended at least in part to benefit his principal in order for the principal to be liable.

No federal court, other than the panel in this case, has ever held that a principal is liable under the antitrust laws for acts of agents based on an "apparent authority" theory. The federal courts have likewise unanimously rejected an "apparent authority" theory as inapplicable to determinations of liability under federal regulatory statutes. Since vicarious liability under the antitrust laws should be judged under at least as strict a standard as liability under statutes requiring simple rather than treble damages, both the specific holding of the panel's opinion and its underlying rationale squarely conflict with decisions in the other federal courts.

As already discussed, in *Truck Drivers' Local No. 421* v. *United States, supra,* 128 F.2d 227, the Eighth Circuit held that in an antitrust case "mere apparent authority would not be sufficient to take the matter to the jury," *id.* at 235, holding, under *Coronado Coal,* that actual authority or ratification was necessary.

The Ninth Circuit, in an antitrust case brought under Section 1 of the Sherman Act, has also addressed the circumstances under which a corporation is liable for its agents' acts. In *United States* v. *Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the Court held that a corporation may be liable even if it did not actually receive the benefit of the agent's acts. The Ninth Circuit squarely held, however, that the corporation would not be liable if the agent intended to benefit only himself or another, since "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Id.* at 1006, n. 4.

Similarly, in *United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3rd Cir. 1970), *cert. denied,* 401 U.S. 948 (1971), the Third Circuit upheld corporate liability under the federal antitrust laws for the acts of an employee on the ground that the agent was "motivated at least in part by a desire to serve" the principal. *Id.* at 204.*

* Likewise, in *Arthur* v. *Kraft-Phoenix Cheese Corp.,* 26 F. Supp. 824 (D. Md. 1937), the Court dismissed a federal antitrust complaint on the

As the panel in this case acknowledged, the principle inherent in these cases—that an organization may be liable for the acts of its agents only if the agent intends thereby to benefit the corporation—is the general agency rule for tort liability. A-13; 635 F.2d at 125. For example, the *Restatement (Second) of Agency* provides generally that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.*, section 235. Similarly, a principal is not deemed to have knowledge of events based solely upon the knowledge of an agent if "the agent secretly is acting adversely to the principal and entirely for his own or another's purposes. . . ." *Id.*, section 282(1).

These settled principles of agency liability have been repeatedly relied upon in many contexts in addition to antitrust cases, including suits under federal regulatory statutes. The many federal courts utilizing these agency principles have expressly rejected the panel's notion of "apparent authority" as a basis for liability and the panel's reasoning is squarely in conflict with these cases. For example, in *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub. nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969), where the plaintiff brought a fraud action under the federal securities acts, the Court noted,

> "[A]s in other situations governed by agency principles, knowlege of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of the corporate principal."

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ground that the complaint was filed against a corporation rather than its agents:

> "If they [the defendant's agents] had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, it is conceivable that a common law tort suit might lie against them; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade on the part of the defendant corporation."

Id. at 830.

Id. at 211.

Similarly, in *Standard Oil Co. of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962), a prosecution under the federal Hot Oil Act, the Fifth Circuit rejected a finding of liability for an agent's acts since:

> "the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235."

Id. at 128 (footnote omitted). See also, *Moscarelli* v. *Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968) (securities case; "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . ."); *Slade* v. *Shearson, Hammill & Co., Inc.*, 79 F.R.D. 309, 313 (S.D.N.Y. 1978) (fraud suit under Securities Exchange Act of 1934; corporation may raise defense "that as a principal it cannot be held chargeable with acts of its faithless employees who committed fraud on the bank in direct conflict with the bank's interest. *See* Restatement (Second) of Agency § 282"); *In re Investors Funding Corp. of New York*, F. Supp. , (CCH) Fed. Sec. L. Rep., ¶ 97,696, at p. 89,654 (S.D.N.Y. 1980) (suit under Securities Exchange Act of 1934, "when an agent is acting adversely to the interest of the principal, his knowledge and conduct are not imputed to the principal").

In the Court of Appeals, Hydrolevel attempted to distinguish *Standard Oil* and other cases upon which ASME relied by claiming—without any citation or authority—that those decisions involved criminal prosecutions and that a different rule for vicarious liability should apply in civil cases. This purported distinction, of course, does not apply to the many civil cases upon which ASME relies. See, *e.g.*, *Arthur* v. *Kraft-Phoenix Cheese Corp.*, *supra*, 26 F. Supp. 824 (civil

antitrust case); see also civil cases cited at p. 18, *supra*. Moreover, no decision discussing vicarious liability under the antitrust laws or any federal regulatory statute has ever distinguished between the requirements for civil and criminal cases; indeed, civil decisions frequently rely upon criminal precedents and vice versa. See, *e.g.*, *Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.*, 509 F.2d 147, 151 (5th Cir. 1975) (civil action), relying on *United States* v. *Hilton Hotels Corp.*, *supra*, 467 F.2d 1000 (criminal antitrust suit). Furthermore, the *Restatement of Agency* does not distinguish between agency liability in civil and criminal matters. Finally, this distinction makes no sense. When a statute authorizes both a civil suit and a criminal prosecution, the Constitution and traditions of criminal procedure require a heightened showing of *mens rea* for criminal prosecutions, *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 436, and proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970). This Court has never suggested, however, that a criminal prosecution requires a special showing of vicarious liability; rather, its decision in *Pinkerton* v. *United States*, 328 U.S. 640, 645-48 (1946), allowing criminal liability based solely on the acts of conspirators, suggests that the principles of vicarious liability in civil and criminal cases are the same. See also Note, Developments in the Law—Conspiracy, 72 *Harv. L. Rev.* 920, 1000, n. 611 (1958) (in discussing liability for antitrust conspiracy, "in practice the Courts do not seem to have distinguished between civil and criminal Sherman Act cases").

These principles of agency liability, utilized by the federal courts in both antitrust cases and other actions under the federal regulatory statutes, clearly require reversal of the jury's verdict for, as the appellate panel tacitly accepted, there was no evidence, or even a logical basis for inference, that Hardin or James intended or could have intended by their illicit acts to benefit ASME, rather than their employers, M&M and Hartford.

In declining to follow the general rule of agency liability, the panel reasoned that "the conduct at issue here is far closer

to the torts discussed in § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement." A-13; 635 F.2d at 125.* As noted above, however, these principles of vicarious liablity have never been applied in any federal antitrust case, and are implicitly rejected in those federal court decisions, including *Coronado Coal*, requiring actual authority and an intent of the agent to benefit the principal.

Equally important, the panel departed from the rationale for allowing liability upon a showing of apparent authority in the limited category of cases where that principle is followed. Agency decisions not requiring the agent's intent to benefit the principal, and those few sections of the *Restatement* adopting this principle, are based upon the concept of *reliance:* In a limited number of circumstances, a plaintiff should be entitled to rely on an agent's apparent authority, and for this reason the principal is liable for the agent's acts, *to a plaintiff who so relies*, irrespective of the agent's motive. The theory of apparent authority, as set forth in the *Restatement (Second) of Agency* at section 8, is that when the agent's authority has been directly communicated by the principal to a third party, the principal is estopped from denying authority as to that third party. This was emphasized by the Seventh Circuit in *Sennott* v. *Rodman & Renshaw*, 474 F.2d 32 (7th

* These sections are not only inappropriate to an antitrust case, as demonstrated in the text, but are inaccurately summarized by the panel. Comment c to Section 247 (defamation), upon which the panel relies, states that the principal is liable for the acts of an agent "provided that he acts at least in part to serve his employer's purposes." See *Hooper-Holmes Bureau, Inc.* v. *Bunn*, 161 F.2d 102, 104 (5th Cir. 1947) (defamation case; "The defamatory statements made by a servant only for his own purposes, although made during a transaction in which the servant is acting for the corporation, does not subject the corporation to liability."). Similarly, Comment a to Section 248 (interference with business relations) states that an agent's act binds the principal only "if intended for the benefit of the principal or master. . . ." Thus, these sections specifically support ASME's position, and would require reversal of the panel's opinion.

Cir.), *cert. denied*, 414 U.S. 926 (1973), a suit under the federal securities acts. After a brokerage house had been found liable for the acts of one of its agents, the Seventh Circuit reversed because the trial court had erroneously proceeded on a theory of apparent authority:

> "Under Sennott's theory of apparent authority or estoppel, therefore, plaintiff would be required to prove that he was relying upon [the agent's] apparent authority, and hence on Rodman, when he decided to purchase the Skyline options. Reliance is not evident from the record before us."

Id. at 38. Liability based upon apparent authority, in which intent to benefit the principal was not shown, has been upheld only in cases where reliance by the plaintiff on the agent's apparent authority was demonstrated. See, *e.g.*, *Employer's Liability Assurance Corporation* v. *L.J. Marcotte Insurance Agency*, 314 F.2d 470, 474-76 (8th Cir. 1963) (common law fraud case; plaintiff relied upon apparent authority of insurance agent). In such cases, a universal element was that plaintiff himself relied upon the manifestation of authority given by the defendant.

The element of reliance clearly has no application to the antitrust laws generally and is not present in the instant case. First of all, it is anomalous to apply a theory of apparent authority (and its attendant additional element of direct reliance) to laws governing restraint of trade or monopolization, which are designed to protect the marketplace as a whole rather than the individual rights of a specific business. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws, however, were enacted for the protection of *competition*, not *competitors*" citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). In any event, in the instant case Hydrolevel never even saw the April 29, 1971 letter until after the putative damage was done and obviously did not "rely" on the apparent authority of Hardin. Conversely, if one were to assume that prospective purchasers of Hydrolevel's device did rely on the apparent authority of

Hardin to issue the April 29 letter, those putative victims were not parties to this suit.*

In summary, the theory of vicarious liability adopted by the Second Circuit in this case has been rejected not only in every antitrust case reaching the issue but in federal court decisions interpreting other federal regulatory statutes as well. There is thus a square conflict among the Circuits on both the express holding and the underlying reasoning of the panel's decision, and this Court should grant the writ to review this decision.

III. The Panel's Decision Creates An Unwise and Unworkable Policy In The Administration of the Federal Antitrust Laws, And Will Have Disastrous Effects On Many Voluntary Organizations.

In considering the merits of this petition, the Court should be aware that more is at stake than simply the rights and interests of the two litigants—much more. The way in which the questions raised in this petition are answered will profoundly affect the operations and programs of a broad range of professional, technical and voluntary associations which play a vital role in the American enterprise system.

Writers as early as DeTocqueville, see *Democracy in America*, p. 198 (Mentor ed. 1956), have commented on the profound importance of voluntary associations in American life. Voluntary groups serving the public interest—bar associations, doctors, accountants, architects and engineers groups, and community planning boards, to name just a few—mobilize and effectively channel billions of dollars

* The panel noted that the "difference from the usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material." A-14; 635 F.2d at 125. The issue in the only decision upon which the panel relied for this proposition, *Ricketts* v. *Pennsylvania Ry. Co.*, 153 F.2d 757 (2d Cir. 1946), was whether a tort plaintiff was estopped by a release his lawyer had fraudulently induced him to sign. The Court held that he was not, but "assumed" that if the plaintiff had given the attorney actual authority to settle the claims he would have been so bound. *Id.* at 759. This dictum has no bearing on the issues in this case and has never been applied in any antitrust decision.

worth of manpower and talent for the overall public good. Through the volunteer efforts of these organizations, the quality of American life is enhanced in a number of ways, through improved public safety and product reliability, greater availability and wider dissemination of appropriate equipment and procedures for industry, better educated professionals for the work force of the country, and maintenance of high ethical and professional standards. As the panel acknowledged (A-16; 635 F.2d at 126), professional and technical organizations must and do rely on the expertise and services of individual volunteer members drawn in part from businesses whose economic interest may potentially be affected by the organization's activities.

By adopting a literally unprecedented standard of vicarious liability under the federal antitrust laws, the panel has made such non-profit associations the guarantors of all acts of their members within their loosely-defined "apparent authority"—even if, as here, the organization itself is a deceived victim and the sole intended (and actual) beneficiaries of the improper acts are the member himself and his true principal. This result will be literally devastating to innumerable associations, particularly those whose programs have been widely accepted by government and industry because they effectively serve an important public interest. It takes no feat of imagination to foresee unlimited situations where, as here, a disloyal member of such an organization actively deceives it and secretly allows a third party to misuse the organization's purpose, goals and procedures for its own benefit. The panel's decision will also result in discouraging many of those who would otherwise volunteer their time and talent from so doing and will serve to discourage employers, afraid of increasing their own exposure, from supporting their employees who wish to participate in professional group activities.

Furthermore, the panel's decision is both unworkable and unfair. A linch pin of the panel's decision was its conclusion that ASME had no "internal review procedures" governing interpretation letters, and that James and Hardin acted "without any check or supervision" (A-16; 635 F.2d at 126); the opinion implies that more thorough review procedures

might have immunized ASME from liability. In fact, however, Hardin's draft of the April 29 letter was sent to both the Chairman and the Vice-Chairman of the B-PV Committee for review before release by the Secretary of the Committee. (AX V. 6-7). The letter passed review by those individuals—and undoubtedly would have escaped detection under any system—precisely because no one unaware of M&M's ulterior purpose could possibly have detected the letter's hidden significance. In short, it is impossible to conceive of any workable mechanism for review that would have affected the issuance of the April 29 letter. More generally, any organization can be induced, by a disloyal member familiar with its procedures, into innocently taking a position capable of misuse by a third party. The panel's opinion makes an organization strictly liable for antitrust penalties if a volunteer has a piece of official stationery, a position in the organization, and the guile to misuse both for his own ends. Subjecting an otherwise innocent organization to the awesome potential liability of a treble damage suit for failing to ferret out or detect such disloyalty is both unprecedented and unwise.

Finally, neither common sense nor equity requires the result reached by the panel. Had the lower courts followed the decisions of this Court and the other federal courts and required a showing either that Hardin and James intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts, this standard would have had no effect on Hydrolevel's claims against the true villains in the matter, Hardin and James and the corporate entities which received the exclusive benefits of their acts. In escalating the potential liability of voluntary, professional associations to allow treble damages under the antitrust laws for "unintentional participation" in the misdeeds of others, the panel has departed from all relevant precedents on the issue and has grossly extended the federal antitrust laws beyond their proper moorings. It has also placed on the backs of all such organizations a potentially insuperable burden which will surely result in a greater loss to the American public than it will produce financial gain for a few plaintiffs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 22, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 664-5—September Term, 1979

(Argued March 12, 1980 Decided November 24, 1980)

Docket Nos.: 79-7254, 79-7260

HYDROLEVEL CORPORATION, a New York Corporation,

Plaintiff-Appellee-Cross Appellant,

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation,

Defendant-Appellant-Cross-Appellee.

Before:

LUMBARD, FRIENDLY, and MESKILL, *Circuit Judges.*

Appeal from a judgment entered on a jury verdict in the United States District Court for the Eastern District of New York, Weinstein, *Judge*, holding appellant, American Society of Mechanical Engineers, liable for conspiracy to restrain trade and awarding appellee,

Hydrolevel Corporation, damages trebled to $7.5 million.

Affirmed in part; reversed and remanded in part.

HAROLD R. TYLER, JR., Esq., New York, N.Y. (Patterson, Belknap, Webb & Tyler, New York, N.Y., Richard D. Parsons, Esq., Frederick T. Davis, Esq., Steven C. Charen, Esq., of counsel), for *Defendant-Appellant-Cross Appellee.*

CARL W. SCHWARZ, Esq., Washington, D.C. (Metzger, Shadyac & Schwarz, Washington, D.C., Stephen P. Murphy, Esq., William H. Barrett, Esq.; Donald J. Williamson, P.A., New York, N.Y., Michael F. Rehill, Esq., of counsel), for *Plaintiff-Appellee-Cross Appellant.*

LUMBARD, *Circuit Judge:*

The American Society of Mechanical Engineers (ASME) appeals from a judgment of $7.5 million, entered in the Eastern District of New York on February 14, 1979, Judge Weinstein presiding. The jury found that ASME had participated in a conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and assessed damages at $3.3 million. Judge Weinstein deducted from that figure $800,000 paid in settlement by other defendants and then trebled the remainder, awarding total damages of $7.5 million. We affirm

the judgment of liability on a theory different from that of the district court, and remand for a new trial on damages, with instructions regarding the treatment of the settlement payments and the assessment of legal fees.

I. FACTS

ASME is a tax-exempt technical and scientific society founded in 1880 and based in New York. It has more than 90,000 members, drawn from all fields where mechanical engineers are active—including industry, academia, insurance and government—and has an annual operating budget of over $12 million. It conducts educational and research programs, publishes a national magazine devoted to mechanical engineering, and, principally important to this case, promulgates over 400 codes and standards. Those codes have great influence in the profession and the marketplace. Indeed, they have been incorporated by reference into federal, state, and local laws and regulations.[1] Although ASME employs a full-time staff, much of its work is done by volunteers from its membership who participate in ASME as individuals, not as representatives of their employers. Over 10,000 such volunteers participate in the many ASME committees and sub-committees that draft, revise, and interpret ASME's codes. The question in this appeal is whether ASME is liable for the restraint of trade that resulted when two of its highly placed volunteers caused it to issue a misinterpretation of one such code so as to frustrate competition at the expense of Hydrolevel Corporation.

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1 *See, e.g.*, 12 N.Y. Code R. & Reg. §§ 4-1.9, 4-1.10 (1979).

At all relevant times, the Boiler and Pressure Vessel Code set standards for the performance of various components of steam and water boilers and pressure vessels. Section IV of the Code set standards specifically for components of heating boilers, including a device whose name wholly describes its function: the low-water fuel cut-off. If the water inside a boiler drops below a level that is sufficient to moderate the boiler's temperature, the boiler will "dry fire" and can explode. A low-water fuel cut-off cuts off fuel to the boiler, and thus stops it, when the water reaches a certain low point. To ensure that the cut-off operates before the water reaches a dangerously low level, Paragraph HG-605 of Section IV of the Code required that each boiler "have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass" attached to the outside of the boiler.

The leading manufacturer of cut-offs for the last fifty years has been McDonnel & Miller, Inc. (M&M), of Chicago, which annually makes 70%-85% of the sales of "float" cut-offs. The literal nomenclature of this area of mechanical engineering almost wholly explains function: when water in the boiler falls to the critical level, a floating bulb falling with the water trips a switch mechanically linked to the bulb and thus cuts off the fuel. Hydrolevel began in 1965 to manufacture and market a "probe" cut-off which, as its name suggests, penetrates into the water in the boiler. So long as water covers an electrode in the probe, a completed electrical circuit will cause fuel to flow to the boiler; when the water drops below the probe, the circuit is broken and the fuel stops.

Without entering the engineering debate over which kind of cut-off is better, an obviously irrelevant question in this appeal, it must be said that neither was flawless. The one flaw that is relevant was that found in the probe cut-off: because boiling water bubbles and surges inside the boiler, it intermittently falls below the probe and cuts off the fuel although still at a safe level. Hydrolevel therefore incorporated into its probe cut-off a time-delay element that allowed fuel to continue flowing for sixty to ninety seconds after the water fell below the probe. This reduced the fluctuations in the fuel supply caused by bubbling and surging, but still cut off the fuel before the boiler could dry fire if the water actually fell to a critically low point.

In early 1971, a major purchaser of cut-offs, Brooklyn Union Gas Co., had decided to change to Hydrolevel's time-delay probe after years of purchasing M&M's float. At the same time, M&M arranged to use ASME code interpretation procedures to stifle Hydrolevel's competition. John W. James, the Vice-President in charge of Research at M&M, was the Vice-Chairman of the Section IV Subcommittee of ASME which drafted, revised, and interpreted Section IV of the Boiler and Pressure Vessel Code. The Chairman of the Subcommittee was T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company (Hartford), the country's leading underwriter of boiler insurance.[2] In March 1971 James and Hardin, along with James Solon, the President of M&M, and Eugene Mitchell, its Vice-President of Sales, decided to send to the

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2 International Telephone and Telegraph had just acquired a controlling interest in Hartford. At the same time, M&M was initiating what were to become successful negotiations to be acquired by the same firm. ITT completed its acquisition of M&M in December of 1971.

Boiler and Pressure Vessel Committee a letter inquiring whether a cut-off with a time-delay met the standard of Paragraph HG-605. James and Hardin drafted a letter of inquiry that they believed would elicit a negative answer. On April 12, Mitchell signed the letter and sent it to W. Bradford Hoyt, the Secretary of the Boiler and Pressure Vessel Committee, who was a full-time ASME officer. The letter asked, after paraphrasing Paragraph HG-605:

> Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?

As Secretary of the Boiler and Pressure Vessel Committee, Hoyt processed such written inquiries according to § 8 of the Boiler and Pressure Vessel Committee Procedure. Many inquiries could be answered with form letters authorized in § 8.01. For inquiries that could not be answered by a form reply, § 8.02 provided that the "Secretary shall immediately refer such matters to the Chairman of the proper Subcommittee or to a Special Committee appointed by the Chairman or Vice-Chairman in cases where no other procedure is evident." The April 12 inquiry from M&M could not be answered with one of the form letters under § 8.01, so Hoyt referred it under § 8.02 to Hardin, the "Chairman of the proper Subcommittee."

ASME's procedures then put Hardin in unsupervised control of its response to the inquiry. Under § 8.02, an inquiry that could "be answered by direct reference to

the Code" would receive an "unofficial communication" from ASME. In such instances, "the subcommittee or special committee chairman shall outline the reply to be sent by the Secretary." An inquiry that could not be answered with an unofficial communication would receive, under the other subsections of § 8.02, the attention of the entire subcommittee. Hardin, however, treated the April 12 inquiry as one requiring only an unofficial communication and, accordingly, only his attention. ASME provided no review of Hardin's discretion to respond unofficially to the inquiry. He drafted a reply and sent it to Hoyt, who on April 29 sent an answer to Mitchell, which in pertinent part stated as follows:

> A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.
>
> There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

The second paragraph of this letter does not follow from the first. Whether a cut-off with a time-delay will assure that the water level will not fall dangerously low during the delay depends upon where on the boiler the cut-off is positioned vis-a-vis the water-gauge glass. If

the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass. The letter's first paragraph takes the distance between the cut-off and water-gauge glass into account by referring to Paragraph HG-602(b), which sets the location of the water-gauge glass on the boiler. The second paragraph does not take that distance into account and therefore draws its misleading conclusion.

Despite that failure in logic, the ASME answer proved to be valuable M&M propaganda. M&M included a copy of the April 29 answer in its booklet entitled "The Opposition—Who They Are, How to Beat Them," which M&M distributed to its salesmen. Further, a message from Mitchell in the booklet described Hydrolevel's cut-off and its time-delay and stated:

> A time-delay of any kind in the firing device circuitry would very definitely be against the ASME Code which clearly stipulates the firing device must be shut down at the lowest visible portion of the gauge glass. A time delay would defeat the intent of the ASME Code and this should definitely be brought to the attention of anyone considering the device which included a time delay in the low water cut-off circuitry.

Not surprisingly, copies of ASME's April 29 answer soon reached the hands of customers in the cut-off market.

Hydrolevel first learned about the April 29 answer in January, 1972, from an erstwhile customer. Hydrolevel's Vice-President, Dominic DeLeonardis, requested a copy of the letter from Hoyt. On February 8, an Assistant

Secretary of the Boiler and Pressure Vessel Committee, R. D. Sutton, sent to DeLeonardis a letter that quoted both substantive pargraphs of the April 29 answer but did not reveal, pursuant to ASME's policy of maintaining inquirers' anonymity, that the inquirer had been M&M. After seeing the April 29 letter and recognizing its second paragraph as misleading, and believing that ASME itself had distributed the letter to the cut-off market, Hydrolevel's President, Russel Rymer, complained to Hoyt on March 23, 1972 that the letter had seriously impaired Hydrolevel's sales. Rymer urged that ASME send to whomever might have received the letter a statement that a cut-off with a time-delay can meet the Boiler and Pressure Vessel Code. In response, Hoyt placed the matter of the April 29, 1971 letter on the agenda for the next meetings of the Boiler and Pressure Vessel Committee and Subcommittee, May 4 and 5, 1972.

When the Subcommittee met on May 4, James presided, having succeeded to the chairmanship after Hardin resigned. Among many items of business at this meeting, which like all ASME committee and subcommittee meetings was public, the Subcommittee discussed Rymer's complaint. During that discussion James stepped down from the chair. The Subcommittee voted to "confirm the intent of the first paragraph" of the April 29 letter. James reported this recommendation to the Committee meeting on May 5, along with the Subcommittee's recommendations on other matters. The Committee voted to send Hydrolevel an "official communication", rather than simply reaffirm the first paragraph, and it appointed two Committee drafters. The drafters proposed, the Committee approved, and on June 9, 1972 Hoyt sent to Rymer a letter that reversed

the implication of the April 29 answer by stating "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a)." [3]

Two years later, on July 9, 1974, the *Wall Street Journal* printed an article called "Knocking the Competition—How Rival's Use of 'Industry Code' Report Created Problems for Tiny Company." The article reported Hydrolevel's difficulties in attempting to sell a cut-off which the market still believed did not meet the Code, and it suggested that "a marketing ploy" by M&M had created that belief. It also reported that James had known about the inquiry—but did not report that James in fact had helped draft the inquiry—and it implied that a conflict of interest existed between James's position at M&M and on the Subcommittee.

The article's suggestions of impropriety prompted ASME's Professional Practice Committee to investigate, but it never discovered James's implication in the April 12 inquiry. On the facts before it, the Committee concluded that Hoyt, Hardin, and James had each acted properly. The Committee reopened its investigation, however, in March 1975, after James revealed for the first time, while testifying before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, that he had helped draft the April 12 inquiry and that he had destroyed his correspondence with Hardin after learning about the *Wall Street Journal* investigation from Hoyt. Upon the advice of ASME's counsel, the Committee deferred further action pending this lawsuit, which Hydrolevel commenced on August

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[3] The text of the June 9, 1972 letter is reprinted in Section III of this opinion.

23, 1975, against ASME, M&M, and Hartford. In early 1979, Hydrolevel sold all its assets except this suit for $86,000 salvage value.

M&M settled with Hydrolevel for $725,000; Hartford settled for $75,000, leaving ASME to go to trial alone.[4] The district court first tried the issue of liability, and on January 30, 1979, after a seven-day trial, the jury found that ASME had conspired to restrain trade in the cut-off market. The same jury then heard evidence on the issue of damages. Hydrolevel presented three experts who offered estimates of Hydrolevel's injuries, ranging from $2,358,000 to $7,436,300 based on harms forecast as far in the future as 1988. ASME's only expert witness on damages disputed the methods of computation used by Hydrolevel's experts but offered no alternative damage estimates. ASME's principal defense was that Hydrolevel's losses had been caused by inadequate sales promotion and a defective product rather than by any ASME misrepresentation.

On February 2, 1979, the jury found that Hydrolevel had suffered damages of $3.3 million. Judge Weinstein reduced the damages by the $800,000 settlements to $2.5 million, trebled that, and entered a judgment for $7.5 million. He also denied attorneys' fees for Hydrolevel. ASME appeals from the liability verdict and the damage assessment; Hydrolevel cross-appeals from Judge Weinstein's deduction of settlements before trebling and his refusal to grant attorneys' fees.

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4 The jury was not told about M&M's and Hartford's settlements, and the district court charged the jury, "Do not speculate on why ITT or Hartford Steam or anybody else, individual or institution, is not in the case. You have only one issue before you. Is this defendant liable? That's all." *See* Fed. R. Evid. 408.

II. LIABILITY.

We affirm the jury's verdict of liability under § 1 of the Sherman Act, a verdict based upon a finding that ASME had conspired with others to restrain trade unreasonably in the low-water cut-off market by disparaging Hydrolevel's cut-off through a misinterpretation of the Boiler and Pressure Vessel Code. Given the effect and intent of the April 29 interpretive letter and its subsequent misuse by M&M, the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product. The more troublesome question, which we also decide in favor of Hydolevel, is whether ASME may be held liable as a conspirator because of the acts of its agents.

Although we affirm the jury's verdict, we do so on a theory different from that embodied in the instructions to the jury. In its Request Number 28, Hydrolevel requested that Judge Weinstein charge the jury that ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME. Judge Weinstein, however, rejected that view and instructed the jury that ASME was not liable for its agents' acts unless (1) ASME ratified those acts or (2) the agents had acted to advance ASME's interests. He charged:

> Now the law holds a corporation responsible for the unlawful act of its agents or officers but only when those unlawful acts are performed within the scope of the authority of the officers and on behalf of the corporation.
>
> . . .

> If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

The argument on this appeal centered on whether the evidence justified a verdict for Hydrolevel under either of the district court's theories. We need not resolve that dispute, for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory.

The district court charged the jury that ASME could be held liable only if the jury found that ASME had ratified the acts of its agents or if the agents had acted to advance ASME's interests. That is the appropriate theory for conventional torts. *See* Restatement (2d) of Agency §§ 235, 236. The conduct at issue here, however, is far closer to the torts discussed in § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement. See § 257, comment d; § 261, comment a; § 262. Under these sections it is likewise immaterial that the agent knows the transaction to be a sham. *See* § 261, comment a and illustration 3. The leading case holding the principal liable where the agent commits fraud while acting within the scope of his apparent authority, although without intention to benefit the principal, is Mr. Justice Stone's opinion in *Gleason v.*

Seaboard Air Line Co., 278 U.S. 349 (1929), which since then has not been questioned.

The reasons for this stringent treatment of intentional torts are not difficult to find. Such torts arise from and are enhanced by the agent's appearance of authority. Third persons—here the customers to whom M&M's circulated the misleading ASME letter—are entitled to rely on that appearance. Moreover, as stated in § 247, dealing with defamation, the act of the agent "is effective, in part at least, because of the personality" of the principal. Or, as said in § 261, comment a, dealing with fraud:

> [L]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Imposing liability on the principal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injure competitors.

Hardin's conduct here was essentially a fraud, a willful and knowing misrepresentation of the Code. The victims, however, were those customers to whom he knew M&M would circulate the letter as well as, ultimately and most seriously, the plaintiff. This difference from the more usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material. In *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2d Cir. 1946), we held that there is

"no distinction in principle" between the situation in which the agent deceives the third person "and one in which the agent deceives, not the third person, but his principal." Alternatively, the tort could be regarded as "injurious falsehood." *See* Prosser, Torts § 128 at 915-26 (4th ed. 1971); Restatement (2d) of Torts § 623A. As to this, the Restatement (2d) of Agency tells us, § 248 comment b, that where "harm to business relations is accomplished by defamation or other methods of untruthful publicity, a servant with apparent authority to make statements binds his employer, irrespective of his motive . . . ."[5]

A conspiracy to restrain trade is so similar to fraud, injurious falsehood, and tortious interference with business relations that application of the Restatement rules governing those torts is appropriate. Moreover, ASME's widespread influence through its Code carries with it a corresponding duty to guard against the misuse of such influence. It is difficult to see how a trade association should be treated any differently than a business competitor, especially when it is the association's standing and influence that makes the conspiracy effective and possible. In a variety of contexts, trade associations are obligated to take suitable precautions to avoid antitrust violations. *See* Symposium, *Trade and Professional*

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[5] Again, if Hydrolevel had sued ASME for what the New York courts have called a "prima facie tort," *see* W. Prosser, Torts § 130 at 953-54, we see no possible basis on which a verdict in its favor could properly be disturbed on the ground of lack of authority on the part of Hardin. Hydrolevel originally sought to hold ASME liable for trade libel, tortious interference with business relations, and violation of New York's Donnelly Act, N.Y. Gen. Bus. L. § 340 (McKinney 1968), which proscribes, *inter alia*, agreements for the purpose of establishing or maintaining monopolies and "[f]or the purpose of unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce." With court approval, Hydrolevel abandoned all of its state law claims before trial.

Associations: The Antitrust Combat Zone, 46 Antitrust L.J. 638 (1977). While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.

Two considerations opposing this more stringent rule of liability warrant brief mention: the treble damages provision in § 4 of the Clayton Act and the non-profit, voluntary aspects of trade associations such as ASME. The first consideration suggests that broad agency theories of liability are inappropriate where treble damages are required. For example, in *United States v. Ridglea State Bank,* 357 F.2d 495 (5th Cir. 1966), the court rejected an expansive agency doctrine in a case under the False Claims Act, 31 U.S.C. § 231 et seq. (1976), because the Act's double damages provision provides "a recovery wholly out of proportion to actual loss." 357 F.2d at 500.[6]

In our view, the treble damages accorded under the antitrust laws are distinguishable. In contrast to a private antitrust action, the United States need not suffer actual damages before collecting penalties under

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[6] *See also Asphalt Industries, Inc. v. Commissioner,* 384 F.2d 229 (3d Cir. 1967) (corporation held not liable for tax fraud penalties caused by fraudulent acts of its president against the interest of the corporation). Restatement (2d) Agency § 217C also restricts the imputation of liability for punitive damages but says that the rule there stated does "not apply to the interpretation of special statutes such as those giving triple damages, as to which no statementis made." § 217C, comment c.

the False Claims Act. *See United States v. Cherokee Implement Co.*, 216 F. Supp. 374, 375 (N.D. Iowa 1963), and cases cited therein. The comparatively more punitive False Claims Act award includes not only a double damage remedy but also fixed forfeitures for each violation of the act. *See Ridglea, supra,* 357 F.2d at 499.

Beyond this, restraint of trade was, under the common law, a variety of business tort that was remedied through restitution. *See* Comment, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 Harv. L. Rev. 1566 (1967). *See also Standard Oil Company of New Jersey v. United States,* 211 U.S. 1, 50-69 (1911); *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15, 17-18 (3d Cir. 1940).[7] Full restitution of plaintiffs' losses is a no less central objective of the treble damage provision than the encouragement of private antitrust enforcement. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 746-47 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-87 (1977); K. Elzinga & W. Breit, The Antitrust Penalties 66-67 (1966); Comment, *supra,* at 1566-67.

Unlike the False Claims Act penalties, where damages are doubled although the government's losses are readily ascertainable, the trebling of damages under the antitrust laws reflects congressional recongition of the difficulty of proving antitrust damages. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 429 U.S. at 486 n.10; K. Elzinga & W. Breit, *supra,* at 67; Comment, *supra,* at 1566. Thus, we see no reason why the treble

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[7] The treble damage formula itself seems to have been taken from an early English antimonopoly statute. *See* "An act concerning monopolies and dispensation with penal laws and forfeitures thereof," 21 Jac. I. c. 3 1623; K. Elzinga & W. Breit, The Antitrust Penalties 63-64 (1976).

damage provision of the Clayton Act should compel a restricted view of agency law.

That brings us to the second consideration affecting ASME's liability: whether ASME's unique structure or status should mandate a different result. We conclude that it should not. ASME's reliance on *Coronado Coal Corp. v. United Mine Workers*, 268 U.S. 195 (1925), is misplaced; that decision held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. *Id.* at 304. ASME's protest that its status as a professional organization requires more flexible treatment than would be accorded an ordinary corporation is similarly unpersuasive. Dicta indicating more flexible and lenient treatment of professional organizations in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 (1975), and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978), concern the antitrust consequences of such organizations' regulation of their own members. *See generally* Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1364-68 (1978). The dicta of those cases refer only to uniform regulation of the professional conduct of an association's members. By contrast, this case involves the radically different situation where a professional organization having great economic influence is implicated in a conspiracy to restrain competition to the injury of third parties and the public. *See, e.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (corporation criminally liable for boycott participation by purchasing agent disobeying express instruction and motivated by personal pique against boycott target); *Northern Califor-*

nia Pharmaceutical Ass'n v. United States, 306 F.2d 379-86 (9th Cir. 1962) (professional organization subject to Sherman Act where its activities are of precisely the sort that Act condemns).

For ASME to be liable, then, Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions. The district court's charge required either one of those two additional aspects and consequently was more favorable to ASME than it should have been. As the jury found for Hydrolevel on a charge that was more favorable to the defendant than the law requires, we affirm the judgment on liability.

III. ALLEGED TRIAL ERRORS

ASME argues that several errors at trial require reversal of the jury's liability determination. Principally, ASME asserts that the district court erred in admitting four pieces of evidence: the July 1974 *Wall Street Journal* article that contained a concise and apparently corroborating account of Hydrolevel's charges; references to the FTC and Senate Subcommitee investigations of Hydrolevel's charges; the deposition of John Bonner, the chairman of a plumbing supply company, who had been included in ASME's list of possible expert witnesses but who gave testimony damaging to ASME in his pretrial deposition and was never called at trial; and finally, the alleged hearsay testimony of DeLeonardis on conversations with potential Hydrolevel customers who indicated concern that Hydrolevel's device did not meet ASME requirements. We find no error in the admission of this evidence.

The most serious objection raised by ASME concerns the *Wall Street Journal* article. But, to the extent that the article addressed the circumstances attending M&M's April 12 inquiry and ASME's April 29 response, its account was considerably less damning than the facts developed at trial. More important, the article was admitted only to demonstrate the state of mind of those who reacted to it: Hoyt's advising James about the article and James' response in destroying the ASME correspondence file on the subject were relevant to Hydrolevel's ratification argument. The *Journal* article led the ASME directors to call for an investigation that Hydrolevel asserts was never meant to uncover anything. To avoid any undue prejudice, Judge Weinstein instructed the jury initially that the article was not admitted for the truth of its assertions and, in his charge, directed the jury not to read it at all. Taken together, those considerations suggest that admission of the article did not consitute error.

The remaining evidentiary objections are without merit. Mere mention of the FTC investigation and Senate hearings was not impermissibly prejudicial in light of the court's strong cautionary instructions. The Bonner deposition was admitted for the limited purpose of indicating how the April 29 letter might be interpreted in the industry. Although the district court never certified Bonner as an expert, there is no doubt that Bonner, as a businessman, engineer, and potential ASME expert, was qualified to provide expert testimony. Finally, the alleged DeLeonardis hearsay regarding responses of potential customers is expected from the hearsay rule by Fed. R. Evid. 803(3). "Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose . . . ." *Herman Schwabe, Inc.*

v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (citations and footnote omitted); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 803(3)[03] (1979).

In addition to its evidentiary objections, ASME asserts that Hydrolevel's counsel's misstatements and emotionalism during summation require a new trial. We do not agree. Judge Weinstein's rulings regarding the summation were well within his discretion. ASME's trial counsel had ample opportunity to set the record straight during his own summation. In any event, on retrial of damages it should be made clear that misstatements of evidence and extravagant and hyperbolic language and displays of emotion by Hydrolevel's counsel must be avoided.

IV. DAMAGES

We reverse the judgment as to damages and remand for a new trial. The jury returned a verdict of $3.3 million; but, as ASME argues, the verdict was excessive and should not stand. Although the trial judge did not say in so many words that the damage verdict was excessive, he was obviously of the view that the verdict was excessive. In passing on ASME's motion to set aside the verdict and on Hydrolevel's motion for counsel fees, and in directing judgment on the verdict, the trial judge did all he could to reduce the judgment, short of granting a new trial or directing a remittitur in lieu of a new trial. First, the judge deducted the $800,000 already paid in settlements from the $3,300,000 before trebling—which, for reasons stated below, we find to be error. Next, the judge denied the application for counsel fees on the ground that with such a large judgment the

grant of counsel fees was not necessary. This also we find to be error.

Review of the record leads to the inescapable conclusion that the verdict was grossly excessive. Hydrolevel had opeated at a loss in each of the six years preceding the April 1971 letter and it continued to do so in the years following the June 1972 letter of retraction. Hydrolevel's experts were permitted to testify to long-term damage estimates extending to the year 1988 on the tenuous theory that it would take that long to recover fully from the April 1971 interpretation. Moreover, these estimates were based on the assumption that Hydrolevel would gain 10 to 25% of the market, although it had never at anytime reached 1% of the market. Thus, the experts estimated loss profits for eight years ranging from $2,358,000 to $4,406,300 and lost going concern figures in excess of $3,000,000.[8]

The estimates of the experts regarding lost sales were open to serious question for two additional reasons: they relied on lost sales in the international market due to M&M's exclusive distributorship with Honeywell—an agency relationship whose relevance to lost sales was never explained—and to alleged predatory pricing by M&M as to which there was no evidence.

But we see no need to detail all the uncertainties and errors in the presentation of the plaintiff's damage evidence. ASME's responsibility for the damage caused Hydrolevel by the conspiracy extends only to those damages incurred during the period when M&M was able to mislead customers and potential customers about

[8] Although ASME did not object to these damage estimates when they were introduced, it did move at the close of the plaintiff's damage case to strike the plaintiff's experts' computations "as based entirely on supposition and guesswork." Judge Weinstein denied that motion.

the interpretation of the ASME code standards. The June 1972 letter was a retraction of the April 1971 interpretation. It stated:

> This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a). This paragraph relates itself to Par. HG-602(b) which specifically delineates the location of the lowest visible part of the water gauge glass.
>
> If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gauge glass.

The draft of the retraction was sent to over 300 people active in the boiler market. Thereafter, Hydrolevel distributed the June 1972 letter to customers and potential customers. As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, its responsibility for damages was at an end when it provided Hydrolevel with the means of correcting the false impressions caused by the April 1971 letter which M&M had been using. Although ASME never sought at trial to limit the liability for damages by reason of the June 1972 letter, apparently because the district court framed the issues along other lines which made such a limitation seem inconsistent with the position asserted by ASME throughout the trial, the issue of limitation of damages

is available to ASME upon a retrial to determine damages.[9]

As the record on retrial may be more complete on this issue, we leave it to the district court to determine whether the jury should be instructed regarding a time limitation on damages or whether there are factual issues as to the retraction and its effectiveness which the jury must first decide before assessing damages. There are clues in Hydrolevel's summation and in DeLeonardis's testimony that Hydrolevel believed the retraction to have been somehow defective, but those arguments were never developed at trial. One asserted difficulty is that the retraction did not refer to the April 1971 letter, but rather to a later interpretation of that letter sent to Hydrolevel that was dated February 8, 1972. Although DeLeonardis suggested that further steps by ASME, such as publication of a retraction, would have helped Hydrolevel, the record shows no evidence of Hydrolevel ever having complained that the letter was insufficient or ever having requested further aid. Finally, Hydrolevel demonstrated that the second paragraph of the retraction was inserted largely at the urging of James, but Hydrolevel's argument in summation failed to describe what harm that second paragraph could have caused. The record does reveal two attempts by Hydrolevel to use the June 1972 retraction to repair its reputation. We leave the consideration of these possible claims to the trial court.

Consequently, we hold that, if on retrial no further proof is offered regarding ASME's retraction, the district court should instruct the jury to consider only damages incurred from April 1971, the date of the

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[9] Nor did ASME ever argue to the jury the significance of the June 1972 letter.

initial misrepresentation, until a reasonable time after June 9, 1972, the date of Hoyt's correction letter.

As stated above, it was error for the district court to deduct the $800,000 already paid in settlement, from the jury verdict, before trebling the verdict. The district court should first treble the amount of the jury's verdict and then subtract the $800,000 already paid in settlements. In *Flintkote Co. v. Lysfjord,* 246 F.2d 268 (9th Cir. 1957), the Ninth Circuit presented three convincing reasons for trebling damages before deducting settlement proceeds. First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, as discussed above, one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three dollar reduction in the judgment at trial. Accord, *Semke v. Enid Automobile Dealers Assoc.,* 320 F. Supp. 445 (W.D.Ok. 1970); *Bal Theatre Corp. v. Paramount Film Distributing Corp.,* 206 F. Supp. 708 (N.D.Cal. 1962); Note, *Contribution and Antitrust Policy,* 78 Mich. L. Rev. 889, 906 n.87 (1980). We find that reasoning persuasive.

The district court also erred in denying reasonable attorneys' fees to Hydrolevel. Section 4 of the Clayton

Act, 15 U.S.C. § 16 (1976), expressly requires such an award. *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). In determining fees, consideration should be given to any amounts that may have been paid to Hydrolevel's counsel from the settlement money or by the settling parties, and the amount of time spent in preparing the case against M&M and Hartford, both of whom were far more culpable than ASME.[10]

A restriction of expert testimony on damages, limitation of the period for which ASME is responsible, and a charge by the court which provides some specific guidance beyond mere generalities should result in a verdict more in keeping with the harm Hydrolevel suffered and ASME's unintentional participation.

We thus affirm the judgment on liability. We reverse the judgment on damages and remand for a redetermination of damages and counsel fees in accordance with this opinion. Jurisdiciton is retained.

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10 We note that the matter of contribution among joint tortfeasors in antitrust suits is before the Supreme Court in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries Inc. v. Radcliffe Materials*, No. 79-1144 (Nov. 3, 1980). *See also Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 98th Cir. 1979); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980); Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890 (1980).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED: JAN. 22, 1981
A. Daniel Fusaro, Clerk

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of January, one thousand nine hundred and eighty-one.

HYDROLEVEL CORPORATION, a New York Corporation

Plaintiff-Appellee
Cross-Appellant

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York corporation,

Defendant-Appellant
Cross-Appellee.

No. 79-7254
79-7260

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant-cross-appellee, the American Society of Mechanical Engineers, etc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/A. Daniel Fusaro,
Clerk

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.